

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2077

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
WILLIAM E. WRIGHT,

Petitioner-Appellee,

-against-

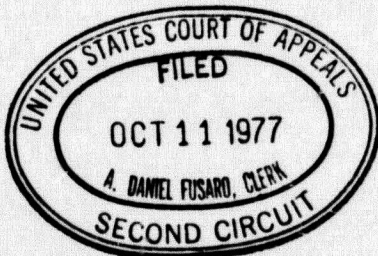
HAROLD J. SMITH,

Respondent-Appellant.
-----X

APPENDIX

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State of New York
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CIVIL DOCKET

Relevant Docket Entries

1a

UNITED STATES DISTRICT COURT

Jury demand date:

Form No. 105 Rev.

Civ-74-46

TITLE OF CASE

ATTORNEYS

WILLIAM E. WRIGHT # 28897 (S)

For plaintiff:

pro se

V.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility

Appointed Counsel:

Robert L. Gannon, Esq.
1056 Ellicott Square Building
Buffalo, New York 14203

For defendant:

Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
State Office Bldg., 65 Court St.
Buffalo, New York 14202

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DIS.

S. 5. mailed

Clerk

S. 6 mailed

Marshal

Basis of Action:

Docket fee

writ of habeas corpus

Witness fees

Action arose at:

Depositions

Relevant Docket Entries

2a

iv-74-464 William E. Wright v. Harold J. Smith, Supt. Attica etc.

DATE	PROCEEDINGS	Date Order Judgment
1974		
Oct. - 2	Filed petition for writ of habeas corpus	
2	" order permitting filing w/o prepayment of filing fee, respondents are ordered to show cause why relief should not be granted ret. 10-29-74 etc.-Curtin, DJ Notice & copies to Petr. & Louis J. Lefkowitz.	F-1
2	JS 5 made	
Dec. 18	Filed respondents affidavit in opposition.	
1975		
Feb. -28	Filed order appointing Robert I. Gannon counsel for petr., & is granted leave to file an amended petition by 4-2-75 or in the alternative petr. brief shall be submitted by 4-16-75-Curtin DJ Notice & copies to Petr., Robert I. Gannon & Louis J. Lefkowitz	F-16
28	Filed CJA-20 copy 5 appointing Robert I. Gannon Counsel for petr. copy 4 mailed to Adm. Office	
May 14	Filed Petr. brief.	
June 20	Filed respondents supplemental affidavit in opposition	
23	Filed respondents brief.	
July 7	" Ltr. dtd. 7/3/75 from assigned counsel to Judge Curtin	
Oct. 28	" Respondent's Supplemental Brief	
Nov. 24	Oral argument on motion. Submitted.	
1976		
1977		
June 15	Filed Decision & Order granting the application for a writ of habeas corpus & the judgment of the Erie Cty. Ct. is hereby vacated. Petr. shall be released from the custody of the N.Y. State Dept. of Correctional Services unless, within 60-days of the date of this Order, further proceedings on the original indictment are initiated. Certificate of probable cause is granted.- Curtin, DJ Notice & copies to Robert Gannon & Louis J. Lefkowitz	F-1
15	Filed Judgment on Decision by the Court-Clerk Notice & copies to Robert Gannon & Louis J. Lefkowitz	F-
15	JS 6 made	
29	Filed Respondent's Notice of Appeal (copy mailed to Mr. Gannon and to Clerk, CCA with copy of docket entries and copy of CJA-20; CCA's Forms C and D mailed to Mr. Lefkowitz, Attn. Mr. Kennedy)	
29	Filed CJA-20 copy 2 authorizing payment of \$269.98 to Robert I. Gannon copy 1 mailed to Adm. Office.	
Aug. 3	Original papers, exhibits, docket entries and Clerk's certificate mailed to Clerk, CCA	

CIV - 74 - 464

Name

William E. Wright

Prison Number

*28297*New York State Identification and Intelligence System
(NTSIIS) Number (if known)*112 352 H**Attica Correctional Facility*

Place of Confinement

RECEIVED

MAY 1 1974

JOHN T. CURTIN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NEW YORK

THE INFORMATION PRINTED ON THIS PAGE REFERS TO
QUESTION 14 OF THE PETITION FOR WRIT OF HABEAS CORPUS

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

- (a) Denial of effective assistance of counsel.
- (b) Denial of right of appeal.
- (c) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (d) Conviction obtained by use of coerced confession.
- (e) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (f) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (g) Conviction obtained by a violation of the privilege against self-incrimination.
- (h) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (i) Conviction obtained by a violation of the protection against double jeopardy.
- (j) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

United States District Court, Western District of New York

Case No. _____
(To be supplied by Clerk of U.S. District Court)

William B. Knight #23297, Petitioner
(Full name)

v

Harold H. Smith, Respondent
(Name of Warden, Superintendent, Jailor, or authorized
person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY

Instructions - Read Carefully

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and sworn to before a notary public or institutional officer authorized to administer an oath. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished and no briefs or arguments are to be submitted unless requested by order of court.

(3) Upon receipt of a fee of \$5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and one copy must be mailed to United States District Court Judge John T. Curtin, whose address is 614 United States Courthouse, Buffalo, New York 14202.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack ~~Greene County Court~~
Erie County Court
2. Date of judgment of conviction October 2, 1972
3. Length of sentence 1-15 YEARS
4. The indictment number or numbers upon which sentence was imposed 32,658
5. Nature of offense involved (all counts) FIRST DEGREE
Robbery and SECOND DEGREE Robbery - From
the SAME CRIME
6. What was your plea? (Check one)
 - (a) Not guilty (☒)
 - (b) Guilty (☐)
 - (c) Nolo contendere (☐)

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

7. Kind of trial: (Check one)

- (a) Jury (☒)
(b) Judge only ()

8. Did you testify at the trial? Yes () No (☒)

9. Did you appeal from the judgment of conviction?
Yes (☒) No ()

10. If your answer to 9 was "yes", give the following information:

(a) (1) Name of court Appellate Div. 4th Dist.

(2) Result Sent back for re-sentencing only -

(3) Date of result JUNE 29, 1973

(4) Citation of any written opinion or order entered pursuant to such result (if known)

(b) (1) Name of court Court of Appeals

(2) Result DENIED ENTER

(3) Date of result Nov 5, 1973

(4) Citation of any written opinion or order entered pursuant to such result (if known)

 (3) Grounds raised _____

(4) Did you receive an evidentiary hearing on
 the petition, application or motion?
 Yes () No ()

(5) Result _____

(6) Date of result _____

(7) Citation of any written opinion or order entered
 pursuant to such result (if known) _____

(b) Did you appeal the result of action taken on the
 petition, application or motion?
 Yes () No ()

(c) If your answer to (b) was "yes", give the following
 information:

- (c) (1) Name of court _____
(2) Result _____
(3) Date of result _____
(4) Citation of any written opinion or order
entered pursuant to such result (if known)

11. If your answer to 9 was "no", explain briefly why you
did not appeal: _____

12. Other than a direct appeal from the judgment of conviction
and sentence, have you previously filed any petitions,
applications, or motions with respect to this judgment
in any court, state or federal?
Yes () No (☒)

13. If your answer to 12 was yes, give the following infor-
mation as to each petition, application, or motion.
Use the spaces provided below only for information
relating to the first such petition, application or
motion.
Attach additional sheets for information relating to
subsequent petitions, applications or motions.

- (a) (1) Name of court _____
(2) Nature of proceeding _____

- (1) (A) Name of court _____
 (B) Result _____
 (C) Date of result _____
 (D) Citation of any written opinion or order
 entered pursuant to such result (if known)

- (2) (A) Name of court _____
 (B) Result _____
 (C) Date of result _____
 (D) Citation of any written opinion or order
 entered pursuant to such result (if known)

- (3) (A) Name of court _____
 (B) Result _____
 (C) Date of result _____
 (D) Citation of any written opinion or order
 entered pursuant to such result (if known)

- (d) If your answer to (b) was "no", explain briefly
 why you did not appeal: _____

-
-
-
14. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

- A. Ground one: The Trial Court's charge with respect to the defense of Alibi, was erroneous and prejudicial.

Supporting FACTS (tell your story briefly without citing cases or law: The Court's instruction to

The jury placed the burden of proving the Alibi defense beyond a reasonable doubt upon the defendant. The charge on Alibi defense was a prejudicial charge, the length,

10(A)2. Because Court did not comply with Section 360.50 of the C.P.L.

14(A) Ground One:

Dealing with false or concocted testimony was very, very lengthy, however, just a few words were said in regards to whether it was the truth. Defendant contends these instructions unconstitutionally placed the burden of proving the alibi defense beyond a reasonable doubt upon the defendant.

(A) Ground Two:

The Court's remarks at the end of the defense's first alibi witness' testimony were error which destroyed the entire alibi defense.

The Court made the following prejudicial comment, after the examination of the first witness:

"However, it is up to the jury to determine any witnesses is lying, not just this witness but any witness; the believability, the credibility of each witness is up to the jury." (196 Trial Transcript). By making this comment at this time, the court implied that the witness was not "believable". Although the court tried to generalize its initial comment, the harm had already been done and this comment was fixed in the minds of the jurors. The function of the trial court is to preserve scrupulously the legal rights of both the People and the Accused and not to insure victory or defeat for either contestant.

(C) Ground Three:

Defendant was denied due process of law by virtue of the line-up procedures as elicited in the Wade hearing and the defendant's motion to suppress the identification should have been granted below:

The facts adjudicated at the pre-trial Wade hearing showed the methods in obtaining the identification were so suggestive the identification did not emanate from the witness' independent viewing during the incident. Complainant was unable to make an identification upon viewing mugshots at the Buffalo Police Headquarters the day after the incident. It is not clear whether appellants mugshot was included in those which the witness viewed. However, Officer Peacock, testified that he showed appellants mugshot from his own personal file. "It is not clear where Officer Peacock obtained appellants mugshot. However, the use of the phrase "mugshot" by the Police Officer would tend to indicate that he received a copy of the photograph from the files of the Buffalo Police Identification Bureau. It would also seem that, that picture should have been included in those which the police-officer witness initially viewed at the Police Headquarters, since the police officer testified that the witness viewed those pictures that went along with the description of the defendant. The description did not change between the time of the initial viewing of the mugshots at Police headquarters and the time the police officers went to the witnesses home". Conduct and procedures that were used by the police were highly suggestive and conducive to mistaken identification and unconstitutional, thus violating petitioners rights of due process of the law. In reviewing the entire procedure used by the police to determine whether there had been a violation of due process, differences in physical appearance are especially suggestive, difference in hairstyles and especially size are suggestive. Petitioner's attorney at the time of the line-up made objections to the line-up.

B. Ground two: _____

Supporting FACTS (tell your story briefly without
citing cases or law: _____

C. Ground three: _____

Supporting FACTS (tell your story briefly without
citing cases or law: _____

D. Ground four: _____

Supporting FACTS (tell your story briefly without
citing cases or law: _____

15. If any of the grounds listed in 17 A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

16. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes (✓) No ()

17. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Richard Wyszynski

(b) At arraignment and plea George H. Palmer

(c) At trial George H. Palmer

(d) At sentencing George H. Palmer

(e) On appeal Edward L. Chassin
366 Stalbridge Building

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

18. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes (☒) No ()

19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes () No (☒)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes () No ()

Wherefore, the petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Executed at

Attica Correctional Facility

on May 14, 1974, 19 74.

William B. Knight
Signature of Petitioner

FORMA PAUPERIS AFFIDAVIT

(See instructions at beginning of this form.)

I hereby apply for leave to proceed with this petition for writ of habeas corpus without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

- (1) I am the petitioner insaid petition, and I believe that I am entitled to redress.
- (2) I am unable to prepay the costs of said action, or give security therefor, because: I

HAVE NO FUNDS OR MEANS TO RAISE
SUCH FUNDS. I AM UNEMPLOYED!

- (3) I have no assets or funds which could be used to prepay the fees or costs except NONE

(Write "None" if you have nothing otherwise, list your assets.)

William C. Straight

Signature of Petitioner

(Sign here only if you seek to proceed without prepayment of fees and costs.)

State of NEW YORK

County (City) of Wyoming

William C. Straight, being first duly sworn under
(Name of Petitioner)

oath, presents that he has read and subscribed to the above

and states that the information therein is true and correct.

William C. Straight

Signature of petitioner

(Required as to each petitioner)

Subscribed and sworn to before me this 14
day of May, 19 74.

Notary Public or other
person authorized to
administer an oath.

Russell J. Siraguse
RUSSELL J. SIRAGUSE
Notary Public, State of New York
Qualified in Livingston County
My Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED

JUN 16 1977

WILLIAM E. WRIGHT,

N. Y. S. DEPT. OF LAW

BUFFALO OFFICE

Petitioner

-VS-

Civ-74-464

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent

APPEARANCES: ROBERT I. CANNON, ESQ., Buffalo, New York,
for Petitioner.

LOUIS J. LEFKOWITZ, ESQ., Attorney General,
State of New York (JAMES L. KENNEDY, ESQ.,
OF COUNSEL), Buffalo, New York, for
Respondent.

Petitioner William E. Wright was convicted of robbery in the first degree and robbery in the second degree (violations of New York Penal Law §§160.15 and 160.10, respectively) on August 3, 1972, following a jury trial in Erie County Court. In his application to this court for a writ of habeas corpus, petitioner has presented four grounds which he claims require reversal of his conviction:

- (1) the pre-trial identification procedures were unnecessarily and impermissibly suggestive;
- (2) the double jeopardy bar of the fifth amendment of the Constitution was

-2-

violated when the court allowed the jury to find petitioner guilty of both robbery in the first degree and robbery in the second degree;

- (3) the trial judge's comment to the jury following the testimony of an alibi witness, petitioner's sister, that she would not lie to help her brother, violated due process; and
- (4) the trial judge's charge to the jury on the matter of petitioner's alibi defense shifted the burden of proof to petitioner and thereby resulted in a denial of due process of law.

At petitioner's trial, Mrs. Ruth Kowles, an employee of the Erie County Department of Social Services, testified that on November 11, 1971, at approximately 4:45 p.m., her purse was forcibly taken from her by two black men in the vicinity of the Commodore Perry Housing Project in Buffalo, New York. The entire episode lasted less than one minute. In court, Mrs. Kowles identified petitioner as one of her assailants and she further testified that petitioner had threatened her with a knife during the incident.

Upon conviction, petitioner, an admitted narcotics addict, was sentenced to an indeterminate period of

-3-

incarceration of up to 25 years on the first degree robbery charge and an indeterminate prison term not to exceed 15 years on the second degree robbery charge, the terms to run concurrently. The Appellate Division, Fourth Department, reversed the conviction only with respect to the sentence imposed and remanded the case to the Erie County Court for resentencing. 346 N.Y.S.2d 737 (4th Dept. 1973). Petitioner was resentenced in September 1973 to an indeterminate sentence of 0 - 15 years for the first degree robbery count and 0 - 7 years for the second degree robbery count, the terms again to run concurrently. The New York State Court of Appeals then denied leave to appeal (November 5, 1973). Petitioner has thus exhausted his state court remedies for those claims which he has presented to this court.

Petitioner first contests the validity of the identification procedures that were used by law enforcement officials prior to the in-court identification of petitioner made by the victim of the robbery. Shortly after the robbery, Mrs. Nowles described her assailant as being a Negro male in his early 20's, approximately 5'6" tall,

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of medium build and medium skin color, with a close-cut bush hairstyle. On the day following the crime, Mrs. Kowles viewed over 100 mug shots at police headquarters and was unable to identify her assailant as being among those mug shots.

At the Wade hearing held on July 31 and August 1, 1972, Detective Donald Peacock of the Buffalo Police Department testified that he had learned from other officers that petitioner William Wright had been "active" at the time of the robbery in the seventh precinct where the Perry Project is located. Detective Peacock then added petitioner's picture to some 30 other pictures from his "personal collection" and had Mrs. Kowles view a number of these pictures in her home. At the Wade hearing, Mrs. Kowles testified that she viewed approximately 5 pictures and was able to identify the petitioner from among this group of pictures. Detective Peacock testified that he had shown Mrs. Kowles approximately 12 photos. The court accepted the detective's testimony in its findings.

There is nothing further in the transcript of the Wade hearing that would indicate any improper suggestions

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in police conduct at the time that Mrs. Kowles viewed these photographs. I find that these photo identification procedures used by the police were not so unnecessarily suggestive and so conducive to irreparable mistaken identification that the defendant was denied due process of law. It was therefore proper to admit this identification evidence at petitioner's trial. See Stovall v. Denno, 333 U.S. 203, 302 (1967).

On December 6, 1971, approximately three weeks after she had identified petitioner from among police mug shots, Mrs. Kowles was asked to view a lineup at police headquarters, in further efforts to identify her assailant. The same 5 black males participated in each of two lineups viewed by Mrs. Kowles on that date. The testimony at the Wade hearing indicated that three of the participants in the lineup were taller than the petitioner. The height difference between these three individuals and petitioner was further accentuated by the fact that each of these three taller individuals had Afros or bush hair styles. The other lineup participant was approximately the same height as petitioner, 5'8" tall, and wore a close-cut hair style,

-6-

similar to petitioner's. Petitioner was represented by an attorney who was present at the lineup and who expressed his objection to the fact that only one individual other than petitioner had short-cropped hair and that this individual was the only one of the group who was within 3 inches of petitioner's height. The transcript of the Wade hearing contains no other testimony that would indicate suggestiveness in police conduct during the course of the lineup.

Petitioner contends that these differences in physical appearance, hair style and height, as identified at the Wade hearing, are clearly indicative of an impermissibly suggestive procedure followed by police at the lineups. It is true that certain discrepancies existed between the height and hair style of the defendant and those of three other participants in the lineup. One other lineup participant was approximately the same height as petitioner and wore his hair in a similar fashion. As Judge Friendly of this circuit has recognized, there is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance, however desirable that may be.

United States v. Reid, 517 F.2d 933, 966, n.15 (2d Cir.

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1975). The Second Circuit Court of Appeals has found that the fact that a defendant, a short man, was placed in a lineup with mostly taller men, "while certainly not the most desirable procedure, does not by itself warrant a finding of unnecessary suggestiveness." United States ex rel. Della v. Reid, 527 F.2d 380, 384 (2d Cir. 1975). See also United States v. Jackson, 509 F.2d 409 (D.C.Cir. 1974) (of 11 men in lineup, defendant was the only participant with a "bush" or Afro hair style). Cf. United States ex rel. Cannon v. Smith, 527 F.2d 702 (2d Cir. 1975).

While the two lineups may not have been conducted under optimum conditions, given the totality of the circumstances I do not think that the likelihood of misidentification was so great as to constitute a violation of due process. See Hail v. Bigners, 409 U.S. 133 (1972). Mrs. Kowles had only 30 to 60 seconds in which to view the assailant during the robbery but, as she testified at the Wade hearing, she looked at her assailant very closely so that she would be able to identify him later. The description of her assailant which the victim gave to the police shortly after the crime fit the description of the petitioner. The time that elapsed between the crime and the

-2-

photo identification was approximately one week and the lineups were held approximately three weeks later. At the lineup, each participant was required to repeat the words, "Shut up, give me the purse, give me the purse." The victim then identified the petitioner, both by his voice and by his appearance, as the individual who had taken her purse. At the time of the photo identification and at the time of the two lineups, Mrs. Kowles was positive of her identification of the petitioner.

The evil to be avoided in the course of a lineup identification procedure is "a very substantial likelihood of irreparable misidentification." Simmons v. United States, 300 U.S. 377, 384 (1963). I find that neither a due process violation nor a miscarriage of justice occurred as a result of the procedures that were relied on at the lineup. Mrs. Kowles' lineup identification testimony was therefore admissible at trial. See United States ex rel. Pella v. Reid, supra; Caver v. State of Alabama, 537 F.2d 1333, 1334-5 (5th Cir. 1976); Stovall v. Denno, supra.

Petitioner next alleges that he was subjected to double jeopardy, in violation of his rights under the Fifth

-2-

and fourteenth amendments to the Constitution, when the court allowed the jury to consider and to find him guilty of both robbery in the first degree and robbery in the second degree. In this instance petitioner was convicted on two counts which arose out of the same act or transaction. First, petitioner was convicted on the charge of robbery in the first degree because the jury found that he forcibly stole property from another and that he used the threat of the immediate use of a dangerous instrument, a knife, to accomplish this taking. Second, petitioner was convicted of the count of robbery in the second degree because the jury found that he forcibly stole property from another and that he was aided by another person who was actually present during the course of the crime. As indicated above, petitioner was sentenced to a prison term of 0 - 15 years on the first count, and a prison term of 0 - 7 years on the second count, the sentences to run concurrently.

The double jeopardy clause "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The New York Penal Law

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specifically mandates that sentences imposed after conviction for several crimes arising out of the same act must be served concurrently. New York Penal Law, §70.25 (McKinney's 1975). I find that the trial court complied with the statutory requirements of the Penal Law when it imposed concurrent sentences for these convictions on two crimes which arose out of the same incident. The court did not impose multiple punishments on the convictions. It is therefore clear that there has been no violation of the prohibition against double jeopardy.

Petitioner's third claim is that he was deprived of a fair trial by the trial judge's comment with respect to the credibility of witnesses following the testimony of one of the alibi witnesses. In the course of examining petitioner's sister, one of the alibi witnesses, defense counsel asked: "Miss Wright, would you lie to help your brother?", to which the witness responded: "No." (Trial Transcript at 136). Over the prosecution's objection, the trial judge allowed this answer to stand. The judge then commented: "[I]t is up to the jury to determine [whether] any witness is lying, not just this witness, but any witness; the believability, the credibility of each witness is up to the

-11-

jury." (Trial Transcript at 136). I do not find that this judicial remark in any way deprecated defense counsel or the case that he was presenting. Cf. United States v. Bellinger, 472 F.2d 349, 336 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). The judge's comment was merely a cautionary instruction to the jury and in no way expressed his own opinion about the evidence which the alibi witness had just presented. I find that this comment did not in any way deprive the petitioner of a fair trial. See Quercia v. United States, 233 U.S. 466, 470 (1933).

Petitioner's final argument is that the trial court's charge on the matter of the alibi which petitioner offered at trial shifted the burden of proof to the petitioner and thus resulted in a denial of due process of law.

At his trial, petitioner presented two alibi witnesses, his sister and his wife, who testified that petitioner was in his own apartment at 344 Perry Street, Apartment 5-D in the Perry Project, with them, at the time that the robbery took place. These witnesses testified that petitioner did not leave their sight between 4:00 p.m. and 11:00 p.m. on November 11, 1971, except for a brief period

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of a few minutes when the petitioner used a bathroom in the apartment. These witnesses further testified that, because of a cut that he had received on his right ankle several days prior to November 11, 1971, the petitioner was able to move from place to place only with great difficulty. These two alibi witnesses provided the essential basis for petitioner's defense that he was not present at the scene of the robbery of Mrs. Kowles. At the close of testimony petitioner requested that the court give specific instructions to the jury with respect to the alibi defense.

In this circuit, jury instructions in a state trial are normally a matter of state law and are not reviewable in a federal habeas corpus application unless there has been a showing that the alleged errors in the instruction were so serious as to deprive the petitioner of a federal constitutional right. United States ex rel. Smith v. Montanvo, 505 F.2d 1355, 1359 (2d Cir. 1974), cert. denied, 423 U.S. 356 (1975). See also Cabe v. Wughten, 414 U.S. 141, 146 (1973). Federal habeas corpus is available to set aside a conviction only when the impropriety in the challenged jury instruction constitutes a "clear denial of due

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process so as to render the trial fundamentally unfair." Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir.), cert. denied, 400 U.S. 906 (1970), rehearing denied, 400 U.S. 1002 (1971), as referred to with approval in Lee v. Henderson, 342 F.Supp. 561, 563 (U.D.N.Y. 1972). See also United States ex rel. Smith v. Reinecke, 239 F.Supp. 637, 604 (D.Conn.), aff'd, 354 F.2d 412 (2d Cir. 1965), cert. denied, 394 U.S. 993 (1966); United States ex rel. Winfield v. Cassales, 403 F.Supp. 956 (E.D.N.Y. 1975); United States ex rel. Bryant v. Benson, 373 F.Supp. 1100 (S.D.N.Y. 1974).

In a criminal trial the state must always bear the burden of proof, or burden of persuasion, on all elements of the alleged offense. Any shift of the burden of persuasion to the defendant would violate the due process clause of the fourteenth amendment and would render the trial fundamentally unfair. In re Winship, 397 U.S. 359 (1970); Johanson v. Wright, 509 F.2d 823, 831 (5th Cir.), cert. denied, 423 U.S. 1014 (1975). In a case which also explored the validity of an alibi instruction, the Fifth Circuit Court of Appeals has recognized the importance of this rule:

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. . . [A] shift in the burden of proof of an essential element of the crime does rise to constitutional proportions and renders the trial fundamentally unfair. The presumption of innocence and the harsh burden of proof placed on the State in criminal prosecutions are . . . far too important and fundamental to be classified as less than constitutionally protected.

Smith v. Smith, 454 F.2d 572, 579 (5th Cir. 1971), cert. denied, 409 U.S. 835 (1972).

See also Stump v. Bennett, 398 F.2d 111, 116 et seq. (3rd Cir.), cert. denied, 393 U.S. 1001 (1963).

When a defendant raises an alibi defense, he is entitled to jury instructions that specify that the Government must bear the burden of persuasion on this element of the offense as well. See United States v. Marcus, 166 F.2d 497, 503-04 (3d Cir. 1948). The jury must be informed that, once a defendant has offered proof that he was not present at the time and place that the crime was committed, then the Government must convince the jury beyond a reasonable doubt that the defendant's alibi is not true [United States v. Acog, 451 F.2d 710, 723 (3d Cir. 1971), cert. denied, 414 U.S. 820 (1973)], and that the defendant was in fact present at the scene when the crime was committed.

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If such specific instructions are not given when a defendant offers alibi evidence at trial, there is a likelihood that the jury will become confused about the burden of persuasion:

When affirmative proof, best known by the defendant himself, is offered, a likelihood exists that jurors would look to that proof for persuasion of its truth.

United States v. Booz, supra, at 723.

In all criminal trials it is the judge's duty to tell the jury that the defendant does not have to offer any proof in his own behalf. When a defendant does offer affirmative proof of his innocence, such as an alibi, it is important for the judge to advise the jury how it should handle this evidence. There is a natural tendency among ordinary individuals who are serving as jurors to feel that when a defendant comes forward with affirmative evidence of his innocence, ^{1/} then that defendant has the responsibility of convincing the jurors that his evidence is true, accurate and believable. Unless the court fully explains to the jury that the defendant does not have any burden of proving his innocence but that this burden remains on the Government to prove beyond any reasonable doubt each and every element of

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the crime charged, the jury may be left with the misimpression that the defendant is under an obligation to prove that he was some place other than the place where the crime occurred.

In the case before me, if the jury instruction can be read as shifting the burden of persuasion on the alibi issue from the Government to the petitioner, then a due process violation will have been made out. See United States v. Vicerito, 67 F.2d 329, 330 (2d Cir. 1933), cert. denied, 290 U.S. 705 (1934); United States v. Marcus, supra; Smith v. Smith, supra, at 573.

The test is whether the jury, hearing the alibi instruction in the context of the entire charge, would gather from its language the correct rules which should be applied in arriving at a verdict. See People v. Russell, 266 N.Y. 147, 153 (1934); United States v. Birmingham, 373 F.2d 250, 257, rehearing denied, 375 F.2d 232 (2d Cir.), cert. denied, 369 U.S. 637 (1967); United States v. Andreadis, 366 F.2d 423, 434 (2d Cir. 1966), cert. denied, 335 U.S. 1001 (1967). If I conclude that the instruction conveys the impression that alibi is a defense that the defendant must

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establish to the jury's satisfaction, and that there is insufficient remedial language to render this error harmless, then the writ must issue.

My review of the trial court's full instruction indicates that, in most respects, it was a fair and accurate summary of the standards which the jury must apply to the evidence during the course of its deliberations. At the outset, the trial judge instructed the jury that the defendant is presumed to be innocent and that the Government must bear the burden of persuasion on each and every element of the crimes charged in the indictment against the petitioner. The trial judge further advised the jury that it might return a verdict of guilty only after it had been convinced beyond a reasonable doubt that the defendant did in fact commit the crimes charged.^{2/}

However, careful scrutiny of that portion of the instruction concerning the alibi defense^{3/} has led me to conclude that this aspect of the charge is marked by subtle but important deficiencies.

The first infirmity in this instruction lies in the fact that at no point in the instruction did the trial

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court specifically state that the Government must bear the burden of persuasion with respect to the alibi issue. The court failed to state unequivocally that this burden required the Government to convince the jury beyond a reasonable doubt that the alibi offered by petitioner was not true. ^{4/} See United States v. Marcus, supra, at 504; United States v. Boag, supra, at 723.

My second concern is that the trial judge may very well have created confusion in the minds of the jurors, albeit inadvertently, by his use of the following language:

Now, an alibi defense, if clearly -- clearly established by unsuspected, believable testimony, is the very best that an innocent man can make.
(Trial Transcript at 233).^{5/}

I believe that this language, even in the context of the full charge, is confusing at best. Conceivably, it could be read by the jurors as being merely a general observation by the court that, in theory, an alibi that is supported by unsuspected, believable testimony is the best kind of defense that any innocent person can offer. However, I find it hard to believe that the jury would not rely on this standard in the course of evaluating the evidence of the

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case before it. This language may very well have left the impression in the jurors' minds that anything less than "clearly established, unsuspected, believable evidence" would not suffice to support the alibi defense. Such language conveys the impression that the defendant was under some obligation to establish his alibi when the emphasis should properly have been on informing the jury of the requirement that the Government must disprove this alibi defense beyond a reasonable doubt.

The trial judge exhorted the jury to scrutinize the alibi testimony very carefully. He directed the jury to analyze discrepancies and contradictions that were shown to exist in the testimony of the alibi witnesses when compared with other testimony that had been presented. He instructed the jurors to consider whether there was any common or mutual interest that existed among the defendant and the alibi witnesses which might provide a motive or incentive for offering false alibi testimony. Such language in itself does not constitute error. Sullivan v. Scasanti, 429 F.2d 1023, 1025 (1st Cir. 1970), cert. denied, 400 U.S. 1001 (1971). See also United States v. Sullivan, 329 F.2d

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755, 757 (2d Cir.), cert. denied, 377 U.S. 1005 (1964); Taylor v. United States, 300 F.2d 273, 294 (3d Cir.), cert. denied, 303 U.S. 369 (1968). Had this language been balanced by a juxtaposed instruction which specified the nature of the Government's burden of persuasion, this language would present no problem. However, the following language appears immediately after the court's cautionary instruction:

But, if on the other hand, you find that this was, that he was truly in that apartment, that he wasn't out on the street, that he, of course, if you find that he was in that apartment, and never left that apartment that apartment [sic] that afternoon, around 4:45, then you must find him not guilty.
(Trial Transcript at 201).

This language fails to provide the proper balance to assure that the burden of persuasion remained with the Government and was not shifted to the defendant. Rather, this kind of language could be interpreted by the jurors as meaning that the defendant had an affirmative duty to demonstrate that he had been in his apartment at the time the alleged crime was committed.

Finally, I question the propriety of the language used by the trial judge in the supplemental alibi instruction

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where he stated:

[I]f the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here, you have a duty to acquit.
(Trial Transcript at 303).

This language is followed immediately by language that is remedial in nature:

Of course, that is true; if you have a doubt, if you have a doubt as to the guilt of the defendant, you are bound to resolve the doubt in favor of the defendant. I am sure that I told you that.
(Trial Transcript at 303).

I read this language to imply that the defendant who has relied on an alibi defense must take an active role to create reasonable doubt in the jurors' minds with respect to his responsibility for the alleged criminal acts. This instruction would encourage jurors to look first to a defendant's affirmative proof of innocence. A better approach was articulated in United States v. Pook, supra, where the Third Circuit indicated that such proof of alibi "need only raise a reasonable doubt in the jurors' minds as to whether the defendant was present at the scene." 451 F.2d at 724

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^{6/}
(emphasis added). This language is to be distinguished from that used in the case before me where the trial court had indicated that acquittal would be appropriate if the alibi witnesses had created a reasonable doubt as to whether or not the defendant had committed the crimes charged. The difference is a subtle one but I find that the language used by the trial judge here further detracts from the Government's burden of persuasion.

It is my conclusion that the alibi instruction, read in its entirety, was so ambiguous as to allow reasonable people to infer that the petitioner was required to prove that he was not present at the scene of the crime. The constitutional infirmities which I have identified were not cured by the more general language which appears in the course of the charge (see supra, n.2), that the burden of proof never shifts from the Government to the defendant and that the Government must bear the burden of persuasion on all issues raised at trial. United States v. Pogg, supra, at 723-24. Cf., United States v. Vigorito, supra; Sullivan v. Scifati, supra.

This instruction gave the jury a choice between applying two conflicting burdens of persuasion. Reasonable

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minds could infer from this instruction that the defendant still had the burden of showing his non-presence, even though the instruction does state at several points that the burden remains with the state to prove "the crime as a whole." (See Stump v. Bennett, supra, at 122). However, it is clear that the jury does not have this option. The jury may not "ignore the reasonable doubt test on the issue of presence in a criminal prosecution. The Constitution, and more specifically the due process clause of the fourteenth amendment, permits of no such 'choice.'" Smith v. Smith, supra, at 570.

The constitutional deficiencies in this charge cannot be classified as harmless error under the standards established by the United States Supreme Court in Chapman v. State of California, 386 U.S. 18 (1967), and Anderson v. Nelson, 390 U.S. 523 (1968). It is fundamental to our system of justice that instructions to the jury must be consistent with each other and not misleading to the jurors. Smith v. United States, 230 P.2d 935 (6th Cir. 1956). I believe that the instruction in the case before me was likely to have caused confusion and to have created a substantial

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likelihood that the jury would incorrectly place the burden of persuasion on the petitioner with respect to at least one essential element of the crime charged. Such a shift of this burden to the petitioner in the course of the trial renders the trial fundamentally unfair. Johnson v. Wright, supra, at 631. I therefore concur with the conclusion of the Eighth Circuit that "[i]f inconsistent meanings are conveyed by the instruction, whereby a jury could derive an erroneous understanding of the burden, it is difficult to reason that a reasonable doubt does not exist as to the prejudice involved." Stump v. Bennett, supra, at 122.

The application for a writ of habeas corpus is granted and the judgment of the Erie County Court is hereby vacated. Petitioner shall be released from the custody of the New York State Department of Correctional Services unless, within sixty days of the date of this order, further proceedings on the original indictment are initiated.

Certificate of probable cause is granted.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: June 15, 1977

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FOOTNOTES1/

The phrase "affirmative proof of innocence" is to be distinguished from the statutorily defined "affirmative defense." Under the New York State Penal Law defendant has the burden of establishing an "affirmative defense" by a "preponderance of the evidence." NYPL §25.00(2). It is clear that under the New York Penal Law, alibi is not an affirmative defense.

2/

The most comprehensive example of this instruction appears at page 270 of the trial transcript:

. . . [T]he People having accused this defendant of the crime charged, have the burden of proving his guilt beyond a reasonable doubt. This defendant is under no obligation to disprove his guilt, or to prove his innocence. The presumption of innocence is with him. The burden of proving his guilt, rests with the People throughout the trial, and it extends to every element of the crimes charged in the indictment, and it never shifts to the defendant.

The gist of this instruction was repeated at three other points in the course of the judge's charge to the jury. (Trial Transcript at 269, 271 and 279). On three other occasions in the course of delivering the charge to the jury, the court referred to the fact that the jury must be convinced beyond a reasonable doubt that the defendant had committed all elements of the crime. See Trial Transcript at 296, 299 and 303.

3/

The charge in reference to defendant's reliance on alibi as a defense is reproduced in its entirety:

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Now, the defendant in this case, in addition to pleading not guilty, has interposed a defense that is commonly known as an alibi. An alibi is a latin [sic] word meaning elsewhere, and when applied to a trial, or in this trial of a case, a trial such as this, it means that at the time of the alleged crime, said to be committed by the defendant, that the defendant claims that he was someplace other than the scene of the crime. In this case, through two alibi witnesses, he maintains that he was in an apartment, not far from the scene, if I recall correctly. She said, Ruth Kowles said she came out of 312 Perry Street, and that just outside, some thirty, or forty, or fifty feet from where she exited from 312 Perry Street, that she was robbed. Now, the defendant says, through the two alibi witnesses, that he was in fact not out of the house; that he lives at 344 Perry Street, a short distance from the scene, here, but that his physical condition was such that he couldn't run, and that he was in fact not out of the house. It's claimed by one of the alibi witnesses, that he was reading a -- reading to his wife from 4:30 to 5:00, and by the other alibi witness, I believe that he was reading from 4:30 to 5:30, and that he didn't, during this time, leave the house, and in fact, didn't leave the house at all between quarter after four and a quarter to eleven. Now, an alibi defense, if clearly -- clearly established by unsuspected, believable testimony, is the very best that an innocent man can make. No man can be in more than one place at one time. And, if therefore, the defendant was not at the scene of the alleged

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crime at the time when it is said to have been committed, he cannot be guilty of the commission of any of the crimes in this indictment. Now, you ascertain whether this alibi defense was interposed in good faith. This is your job here, or, whether it was a defense that was concocted and resorted to, in an attempt to clear a guilty man of the charge. You should examine not only the principal facts which the alibi witnesses testified to, but carefully examine all of the differences, discrepancies, or contradictions, if there be any in the testimony of these alibi witnesses. You may consider the distances involved from the scene of the events, or, were these witnesses accurate, were they evasive; is there any common or mutual interest among the alibi witnesses, which interest might affect them to the extent of creating or helping to create a false alibi, or is their testimony prompted solely by a desire to assist in the true administration of justice. If, after careful analyzing on behalf of the defendant, the evidence which has been presented here, you find it is false or has been interposed here intentionally as false defense, such a finding of fact, may be considered by you as a circumstance bearing on the guilt or the innocence of the defendant. The jurors have a right, if they find as a fact, that a false defense has been intentionally interposed, to ask, what was the motive underlying the interposition of the false defense, was it, or was it not to escape the force of convincing circumstances, pointing to guilt. If you

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find that any such attempt has been made, you may consider that fact in determining the guilt or the innocence of this defendant. But, if on the other hand, you find that this was, that he was truly in that apartment, that he wasn't out on the street, that he, of course, if you find that he was in that apartment, and never left that apartment that apartment [sic] that afternoon, around 4:45, then you must find him not guilty.

Now, this is a sharp issue of fact. It's left for your determination. . . .

* * * *

Counsel has made a request here that I tell you, if you have a -- if the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here, you have a duty to acquit. Of course, that is true; if you have a doubt, if you have a doubt as to the guilt of the defendant, you are bound to resolve the doubt in favor of the defendant. I am sure that I told you that.
(Trial Transcript at 287-291, 302-303).

3/

The New York statutory language is clear:

When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

New York Penal Law §25.00(1).

As previously recognized, the defense of alibi is not considered to be an "affirmative defense"

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under the New York Penal Law. See supra, n. 1. The New York State Court of Appeals has long recognized that:

. . . "In the trial of a criminal case it can never be necessary to add anything to the plain and simple language of the statute", that any statement of a Trial Judge which tends to deprive a defendant of the full protection of the statute is reversible error and that the force of the constitutional protection is not to be weakened by qualifying words.

People v. Valencas, 15 N.Y.2d 167, 171, 256 N.Y.S.2d 799, 801 (1965).

See also People v. Pittman, 156 N.Y. 253, 266 (1904); People v. Burke, 277 N.Y. 440, 443 (1933); People v. Manning, 273 N.Y. 40, 44 (1933).

5/

Decisions of the New York Supreme Court, Appellate Division, Second Department have specifically recognized that such language is improper and have mandated new trials when such language was used in a jury instruction. See People v. Chestnut, 42 App.Div.2d 534, 345 N.Y.S.2d 79 (2d Dept. 1973); People v. Johnson, 37 App.Div.2d 733, 323 N.Y.S.2d 330 (2d Dept. 1971); People v. Anderson, 37 App.Div.2d 723, 323 N.Y.S.2d 332 (2d Dept. 1971). In People v. Johnson, supra, the Second Department recognized that a defendant

has no burden of producing "unsuspected believable testimony" of an alibi; it is enough for him to produce testimony of the same character as all other testimony-- that is, testimony that the jury may accept, after considering it in the face of all the circumstances.
323 N.Y.S.2d at 331.

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5/

Even this language might be subject to some misinterpretation. The best approach would be for the court to rely solely on the statutory language and to instruct that, when an alibi defense is raised at trial, "the people have the burden of disproving such a defense beyond a reasonable doubt." New York Penal Law §25.00.

JUDGMENT ON DECISION BY THE COURT

RECEIVED

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United States District Court S.D. of NY

FOR THE

CLERK'S OFFICE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 74-464

WILLIAM E. WRIGHT

vs.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John T. Curtin
, United States District Judge, presiding, and the issues having been duly ~~tried~~
(heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the application for a writ of habeas corpus
is granted and the judgment of the Erie County Court is hereby
vacated. Petitioner shall be released from the custody of the New York
State Department of Correctional Services unless, within sixty days of
the date of this order, further proceedings on the original indictment
are initiated.

Certificate of probable cause is granted.

Dated at Buffalo, New York
of June , 19 77.

, this 15th day

JOHN K. ADAMS

JOHN K. ADAMS

Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM E. WRIGHT

Petitioner

-VS-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility
Respondent

NOTICE OF
APPEAL
CIVIL-74-464

SIRS:

PLEASE TAKE NOTICE, that the respondent in the above-entitled proceeding for a writ of habeas corpus pursuant to Title 28 U.S.C., Section 2254 hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the Judgment of the United States District Court, Western District of New York, entered on the 15th day of June, 1977, which granted the applica-

tion for a writ of Habeas Corpus and vacated the judgment of the Erie County Court entered on the 3rd day of August, 1972, convicting the petitioner of robbery in the first degree and robbery in the second degree.

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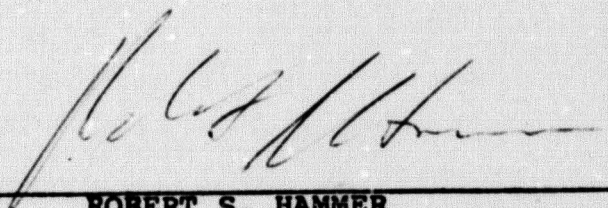
TO: Robert I. Gannon, Esq.
Attorney for Petitioner
1056 Ellicott Square Bldg.
Buffalo NY 14203

TO: William E. Wright
c/o Attica Correctional Facility
Attica P.O. Box 149
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The undersigned member of the bar of this
Court certifies that on September 9, 1977, 1 copy of the
annexed was duly mailed to

Robert I. Gannon, Esq.
Attorney for Appellee
Ellicott Square Building
Buffalo, N. Y. 14203

Dated: New York, N. Y.
September 9, 1977



ROBERT S. HAMMER